



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 38 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY

FOR ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF PUBLIC SERVICE COMMISSION ACT. NO. 10 OF 2017

LAWS OF KENYA; RULES AND REGULATIONS THEREUNDER

AND

IN THE MATTER OF UNILATERAL AND UNPROCEDURAL CHANGE OF TERMS OF

EMPLOYMENT FROM PERMANENT AND PENSIONABLE TO CONTRACT

AND

IN THE MATTER OF INTERPRETATIONS AND GENERAL PROVISIONS ACT CAP 2, LAWS OF KENYA

AND

IN THE MATTER OF GUIDELINES ON TERMS AND CONDITIONS OF SERVICE FOR PUBLIC OFFICERS

AND

IN THE MATTER OF THE BILL OF RIGHTS; RIGHT TO FAIR AND EQUAL

TREATMENT, FAIR LABOUR RELATIONS, FAIR ADMINISTRATIVE ACTION

PURSUANT TO ARTICLES 20, 21, 22, 23, 24, 27, 41, 47, 232,

236 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE

PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

BETWEEN

SAMSON OGECHI NYAANGA.....EX PARTE APPLICANT

VERSUS

THE CABINET SECRETARY,

MINISTRY OF LABOUR AND SOCIAL PROTECTION.....1ST RESPONDENT

THE SECRETARY, PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY OF PUBLIC SERVICE,

YOUTH AND GENDER AFFAIRS.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

The Ex-parte Applicant was appointed as Director of Employment in the Ministry of Labour, Social Security and Services on 4th November, 2015. His appointment letter did not state whether his engagement was on a fixed term contract or on permanent and pensionable terms. His payslips however, referred to him as “*permt*” which he understood to mean “*permanent and pensionable*”. On 20th November, 2017 the PS, the 2nd Respondent, informed him that his engagement was on a 3 year renewable contract/local agreement. He appealed for a review of the decision by the PSC but PSC upheld its decision to engage him on contract terms for reason that he had attained 45 years at the time appointment.

The Ex-parte Applicant aggrieved by this decision filed the instant motion on 2nd January, 2019 seeking the following orders:

1. Spent
2. An order of *certiorari* directed to the respondent removing into the High court for purposes of being quashed the decision of the 1st, 2nd and 3rd Respondents letter dated 2nd November, 2016 communicated to the applicant on 20th November, 2017 letter dated 29th November, 2018, letter dated 7th December, 2018 and 14th December, 2018 purporting to alter/change/convert/
substitute the ex-parte Applicant’s terms of employment from permanent and pensionable terms.
3. An order of prohibition directed at the respondent prohibiting it from effecting/implementing the resolution of the 1st respondent implemented on 2nd November 2016 and communicated on 20th November 2017 (27th November, 2017) and further communications thereto; dated 29th November 2018, 7th December, 2018 and 14th December, 2018.
4. An order of *mandamus* directed at the respondent compelling reinstatement and or restoration of the Ex-parte applicant to the position he served/serves on or before the date of the said impugned alteration of terms from permanent and pensionable to contract.
5. Any other relief deemed fit for grant by court within the ambit of Article 23 (3) of the Constitution.
6. Costs of and incidental to this application be provided for.

The motion is based on grounds that the ex-parte applicant was vide an advertisement in 2015 invited to apply for a job as a Director of employment on permanent and pensionable terms. It is further ground that the 1st, 2nd and 3rd Respondents have purported to change his terms of employment from permanent and pensionable to contract. The Respondents communicated that the decision was to take effect in December 2018.

He avers that his letters of offer, acceptance and appointment never contemplated or envisaged that the employment was on contract basis and that those terms of employment were explicit that he was employed on permanent and pensionable basis.

The ex-parte applicant further avers that his payslips from the month of December 2015 to July 2017 document that he was serving on permanent terms ending in the year 2026. He avers that the variation of terms was not preceded by any notice, memo or circular or letter to or any meeting involving him. In addition, the internal mechanism and appeal made by the ex-parte applicant seeking the reversal of the impugned decision of the 1st and 2nd Respondents has not yielded a fair decision as the 1st, 2nd and 3rd Respondents have maintained that unfair decision that the ex-parte applicant’s contract of employment ends in December 2018.

He contends that the decision of the 1st and 2nd Respondents is unjustified in the context of Articles 20, 21, 22, 23, 24, 27, 41, 47, 232 and 236 of the Constitution.

In support of his motion he swore a supporting affidavit on 21st December, 2018 in which he avers that with the variation of his terms of appointment he stands to suffer inhibition and inability to access the civil servants housing scheme and that it shall lead to his early retirement.

1st Respondent's Case

MARGRET MUIA the Director of Human Resource Management in the Ministry of Labour and Social Protection, State Department of Labour filed a Replying Affidavit sworn on 22nd January, 2019 on behalf of the 1st Respondent.

She deposes that the Applicant upon appointment as Director of Employment reported on duty on 16th December, 2015 and was placed on permanent and pensionable terms on the pay roll under which he served until 2nd November, 2016. She avers that the PSC vide a letter dated 2nd November, 2016 clarified that the Applicant's terms of service was on a 3 year contract/local agreement that was renewable subject to satisfactory performance.

She deposes that the Applicant was over 48 years at the time of his employment therefore ineligible for appointment on permanent and pensionable terms of service. She further avers that the Applicant was a member of KETRI Staff Provident Fund and Group Life Insurance thus he could not transfer his services to the Ministry.

She avers that the applicant requested for leave of absence and has reported back to Kenya Agriculture and Livestock Research Organisation on 2nd January 2019. Therefore, he has not established any cause of action against the Respondents.

Ex-parte Applicant's Response

The applicant in response to the 1st Respondent's Replying Affidavit, filed an affidavit sworn on 7th May, 2019. He avers that the 1st Respondent considered his appointment as the Director of Employment as a continuation of his previous service at KALRO which was on permanent and pensionable terms. He avers that the purported clarification of the terms of the PSC through the letter dated 2nd November 2016 was actuated by malice. It is his case that the letter dated 8th February, 2018 purporting to communicate his terms from pensionable to contract is not signed and it seeks to defeat justice.

He avers that the law and the PSC regulations do not mention any specific age as a minimum requirement for the appointment to permanent and pensionable terms but only mentions a 10 year minimum period of service. He contends that the issue of his leave of absence is an afterthought by the 2nd Respondent after it realised that he had no reason of changing his terms of appointment.

2nd Respondent's Case

SIMON K. ROTICH the 2nd Respondent's Acting Secretary/CEO filed a Replying Affidavit sworn on 20th March, 2019. He deposes that the applicant was appointed as Director of Employment in 2015 but his appointment letter was silent on the terms of service. He avers that the 2nd Respondent clarified that his appointment was on a 3 year renewable contract of service subject to performance. He avers that the Applicant failed to apply for the renewal of his contract and opted to institute the instant proceedings.

He averred that the applicant was initially on a 2 year leave of absence from the KALRO and that his leave was extended for a further one year since he had one year to serve under his contract with the Ministry of Labour. He also stated that the Applicant reported back to KALRO at the start of 2019.

He averred that the allegations that the applicant's terms of service were changed is unfounded as he is employed on permanent terms of service at KALRO. That the 2nd Respondent did not at any point appoint the applicant on permanent and pensionable terms.

Ex-parte Applicant's Response

The Applicant in response to the 2nd Respondent's Replying Affidavit filed an affidavit sworn on 7th May, 2019. He avers that all other persons including directors appointed to the advertised positions are serving on permanent and pensionable terms.

The applicant avers that the 2nd Respondent in its advertisement was clear on the options of employment being either permanent and pensionable or a 3 year contract. He avers that the purported clarification of employment was a completely new appointment. He avers that the assertion that his appointment was silent on terms of employment is not true as there was no mention of the 3 year contract as required by law. He avers that the period of appointment is perpetual up to compulsory retirement which is the ceiling established by law.

He avers that the leave of absence referred to by the 2nd Respondent was requested for purposes of joining Jaramogi Oginga Odinga University of Science and Technology. He avers that leave of absence was never an impediment to any KALRO employee's appointment on pensionable terms in any place he wished to join. He avers that the leave of absence gives former employees of KALRO the option of re-joining the organisation if they wished to on the terms they had prior to leaving.

He avers that the letter dated 14th January 2019 was in response to the 1st Respondent's inquiry of his terms of appointment as per section E31(6) and (7) of the Code of Regulations (revised 2006). He avers that he took leave of absence as opposed to resignation for convenience in transferring his service to KALRO and that he had no intention of going back to KALRO on the expiry of the leave of absence. He avers that reporting back to KALRO would have been untenable for him.

The 2nd Respondent filed a further affidavit sworn by SIMON K. ROTICH on 30th May 2019 who maintains that the applicant is still employed by KALRO and that he requested for leave of absence.

Ex-parte Applicant's Submissions

The applicant submitted that there is a clear indication that the purported 3 year contract appointment was actuated by reasons outside those contemplated in the advertisement for the job. He submitted that the 1st Respondent knew that the Applicant's employment was irregular yet he proceeded to effect unwarranted interdiction.

The applicant submitted that the decision by the 2nd Respondent dismissing his appeal was predetermined and contrary to the law. He argued that this decision was in contravention of section 5 and 6 of the Pensions Act.

He submitted that Regulation E.15 of the Code of Regulation (Revised 2006) defines the translation of terms to permanent and pensionable terms and argued that this definition is in variance with the spirit of the Claimant's appeals. He submitted the allegation by the 2nd Respondent that he was over 45 years thus not eligible to a pensionable appointment is not founded in law.

He submitted that section R. 41, D.21 and D. 22 of the Public Service Commission Human Resource Policies and Procedures Manual Procedures Manual for the Public Service are categorical that the minimum period of service in the civil service is 10 years while the retirement age is 60 years. He submitted that he was 49 at the time of his appointment thus he was eligible to serve for a period of 10 years.

He submitted that he had legitimate expectation that he would work at the ministry on permanent and pensionable. He relied on the case of ***Diana Kethi Kilonzo & Another v Independent Electoral & Boundaries Commission & 10 others [2013] eKLR*** where the Court held that the doctrine of legitimate expectation arises out of a promise made by a public body or official which the persons relying on anticipate will be fulfilled and that the promise an estoppel.

He further relied on section 10 of the Employment Act and submitted that in addition to having legitimate expectation to work at the ministry he was not notified of the change of the terms of his employment. He argued that the Respondents actions were arbitrary and illegal and he deserves judicial review orders as sought. In support of this he relied on the case of ***Municipal Council of Mombasa v Republic & Another [2002] eKLR***.

1st and 2nd Respondents' submissions

The 1st and 2nd Respondents submitted that the application offends Order 53 Rule 2 of the Civil Procedure Rules. They submitted that the decision of the PSC was made on 2nd November, 2016 which was communicated to the Applicant on 20th November, 2017 while the application was filed on 2nd January 2019. They submitted that 2 years have lapsed and that the Claimant has not preferred any reason for the inordinate delay. Thus, he is not entitled to an order of Certiorari as the application is time barred.

The Respondents submitted that the employment relationship came to an end on 15th December 2018. They submitted that the expired contract between the applicant and the respondents was not statutorily underpinned and therefore the applicant can only invoke private remedies. They relied on the case of ***Republic v Professor Mwangi S. Kimenyi Ex-parte Kenya Institute for Public Policy and Research Analysis (KIPPPA) [2013] eKLR*** and ***Erick D. J. Makokha & Others v Lawrence Sagini & Others C.A No. 20 of 1994***.

They submitted that the allegations against the Respondents have not been proved and that this Court ought not investigate or prosecute in respect of these allegations. They relied on the case of ***Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR***.

The Respondents submitted that the applicant has not satisfied the grounds upon which the orders sought can be granted being irrationality, illegality and impropriety of procedure by the PSC. They submitted that the contract issued to the applicant was silent on his terms of service thus it needed clarification. They submitted that the Court of Appeal in ***National Water Conversation & Pipeline Corporation v Jane Kanini Mwanza*** determined how Courts should deal with fixed term employment contracts.

Determination

The letter of appointment dated 23rd February 2016 states:

"Following your appointment to the grade of Director of Employment, Job Group 'S' by the Public Service Commission as communicated in the letter re. No. PSC/13/97/1 dated 25th November, 2015, acceptance of the Offer of Appointment and your subsequent reporting, I am pleased to inform you that you are hereby appointed to the grade of Director, of Employment, Job Group "S" in the national Employment Bureau this Ministry with effect from 16th December, 2015..."

The salary scale attached to this post is within... and you enter the scale at Kshs.120,270 per month and adopt 1st December as your future increment month the first of which will be 1st December, 2016."

The ex-parte applicant avers that this letter of appointment should be read together with his payslips which clearly indicates that he was employed on permanent and pensionable terms. The applicant's payslip indicates that he was to retire on 13th March, 2026. In addition, it bears the abbreviation "permt".

Neither the advertisement nor the Letter of appointment dated 1st December, 2015 provided that the terms of service of employment was permanent and pensionable. The PSC in its letter dated 20th November, 2017 stated:

“ ...

The contents of your letters have been noted and wish to inform you that it was the Public Service Commission decision to appoint you as Director of Employment on a three year contract/Local Agreement (renewable) subject to performance vide their letter Re. PSC/13/98/5 dated 2nd November, 2016. However you are at liberty to appeal to the commission through this office for variation of the decision.”

The applicant appealed against the decision by the PSC and further sought review of the PSC’s decision but the PSC in both instances upheld its decision to engage him on a renewable 3 year contract.

The applicant in his supporting affidavit avers that he had never asked for translation of the terms of service which would have warranted the responses by the PSC. In his letter of appeal for review dated 12th April 2018 the applicant at paragraph 2 (i) acknowledged that the advertisement was not categorical as regards the terms of appointment and that he applied for the post with a permanent and pensionable appointment in mind.

The applicant submitted that relying on the promise by the Respondent that he was employed on permanent terms he had the legitimate expectation that he would continue working at the Ministry.

It is clear from the foregoing that the applicant’s term of employment had no express term in respect of his service. Therefore, there was no promise that he was to work on permanent and pensionable terms. The applicant cannot sustain a claim for legitimate expectation in the absence of a promise.

The Court of Appeal in **Justice Kalpana H. Rawal v Judicial Service Commission & 3 others [2016] eKLR** held:

*“A pre-requisite to successful invocation of the doctrine of legitimate expectation is that the person who bases his or her claim on the doctrine has to satisfy that he or she has relied on the decision-maker’s representation to his or her detriment. In the instant case, the appellant has not demonstrated how she relied on the 1st respondent’s decision to her detriment. A claim based on mere legitimate expectation, without anything more in the form of suffered detriment, cannot ipso facto sustain an action founded on the doctrine of legitimate expectation. (See **Sethi Auto Service Station & Another v. Delhi Development Authority & Others, (2009) 1 SCC 180**).”*

I find that there was no legitimate expectation that the claimant was employed on permanent and pensionable terms. A payslip does not communicate the terms of employment and cannot form the basis for legitimate expectation.

Further as submitted by the respondents, the claimant was in the permanent and pensionable service of KALRO, a government institution and was on a leave of absence for two years, which was extended by another year at the applicant’s request as is demonstrated by the letter from KALRO which I reproduce below–

“Our Ref: KALRO/7849/157

Date: 14th January 2019

Cabinet Secretary,

Ministry of Labour and Social Protection,

P.O. Box 40326-00100,

NAIROBI

RE: APPOINTMENT TERMS OF SERVICE - MR. SAMSON OGECHI NYAANGA P/NO. 7849 R.I. 12

We are in receipt of your letter dated 10th January 2019 with the above as the subject matter.

Please note the above mentioned was an employee of the then

Kenya Agricultural Research Institute (KARI) now Kenya Agricultural and Livestock Research Organization (KALRO). He was on Permanent and Pensionable Terms of Employment and was a member of the KETRI Staff Provident Fund and Group Life Assurance.

Prior to joining the Ministry of Labour and Social Protection, Mr. Nyaanga requested, vide his letter dated 26th October 2015, for a two-year (2) leave of absence. This was granted with effect from 1st January 2016 to 31st December 2017. Upon expiry of the same, he requested for a further one (1) extension, which was also granted with effect from 1st January 2018 to 31st December 2018. The officer was thus expected to resume duties on 2nd January 2019.

SIGNED

B. G. Onyancha

For: Director General”

The applicant was thus not eligible for employment on permanent and pensionable terms as he could not be on such terms in two separate government institutions.

Further as submitted by the respondents, the applicant did not apply for transfer of his pensionable service to the Ministry of Labour thus his permanent and pensionable service remained with KALRO.

For the foregoing reasons, I find no merit in the application and dismiss the same. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JANUARY 2020

MAUREEN ONYANGO

JUDGE